

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3)
4 UNITED STATES OF AMERICA,)
5)
6 Plaintiff,) Criminal Action
7 v.) No. 13-10200-GAO
8)
9 DZHOKHAR A. TSARNAEV, also)
known as Jahar Tsarni,)
10 Defendant.)
11)
12)

13 BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
14 UNITED STATES DISTRICT JUDGE

15 **LOBBY CONFERENCE**

16 **SEALED TRANSCRIPT**

17 John J. Moakley United States Courthouse
18 Courtroom No. 9
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Tuesday, March 24, 2015
22 4:03 p.m.

23 Cheryl Dahlstrom, RMR, CRR
24 Official Court Reporter
25 John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE COURT: I just have a couple of quick things. One is Tazhayakov. There was a motion on the PSR, but I assume the government has some disclosures for a witness to whom I suppose there have been some -- maybe there isn't. Have there been any promises, inducements, et cetera?

MR. CHAKRAVARTY: No, there haven't been. So there was an agreement after his conviction --

THE COURT: Right.

03:02 10 MR. CHAKRAVARTY: -- that -- there was an agreement
11 drafted with the government, which they have. There's nothing
12 else. The PSR doesn't have anything more than the statement of
13 relevant conduct. It does have a guidelines calculation. Said
14 he smoked pot and he committed the crimes. We have the PSR,
15 obviously. We don't think it's actually going to be that
16 useful to them.

THE COURT: I don't think so either. Is there any problem with allowing them to see it?

19 MR. CHAKRAVARTY: No. We don't want to violate
03:03 20 another judge's --

THE COURT: Well, Judge Woodlock has released it for this purpose.

MR. CHAKRAVARTY: That's fine.

THE COURT: As long as it's held confidential.

MS. CONRAD: Sure, of course.

1 THE COURT: So I don't have any problem with that.

2 MS. CONRAD: Okay. So the government will provide it
3 or the Court will provide it?

4 MR. CHAKRAVARTY: We will.

5 THE COURT: The government will. I have it, but I
6 think it should come from the government.

7 MS. CONRAD: I've also made some inquiries regarding
8 his immigration status. Mr. Tazhayakov was originally arrested
9 on his immigration detainer and held for a couple of weeks
03:03 10 before he was charged criminally. So, obviously, you know,
11 pending immigration matters, which create potential bias, which
12 I think are fair game on cross -- and I've asked the government
13 to provide me with documentation and information which came in
14 at some of the other trials, I think, including maybe his
15 suppression hearing, but certainly at the trial of Robel
16 Phillipos.

17 THE COURT: That's between you.

18 MS. CONRAD: I've asked. I haven't gotten an answer.

19 THE COURT: I got dragged in because of the PSR.
03:04 20 We've done that.

21 This is a real small matter. The media motions about
22 access to the witness and exhibit list, is that solved or only
23 part of it solved?

24 MR. WEINREB: No. It's all solved.

25 THE COURT: So any pending motion by the media for

1 access can be treated as moot?

2 MR. WEINREB: Well, they actually withdrew the motion
3 for access --

4 THE COURT: Well, that was -- it wasn't complete
5 enough. That's what raised the question. It seems to have
6 withdrawn something but not something else. That's why I'm
7 asking.

8 MR. WEINREB: My recollection is that their intention
9 was to withdraw the motions for the witness list and exhibit
03:05 10 list as well. But I do know that right now there's essentially
11 an agreement, that they're content with the way things are
12 working. Maybe they haven't withdrawn it because they just
13 haven't gotten around to it, and maybe they haven't withdrawn
14 it because they may want to press it at a later date. But
15 right now I know they're not pressing it.

16 THE COURT: When will we get to the autopsy evidence?

17 MR. WEINREB: We think Thursday.

18 THE COURT: Okay. So with respect to the pictures,
19 they're -- one, I will allow some autopsy pictures as a general
03:05 20 matter. There's a motion to exclude them all, but I don't
21 think they all should be excluded. From what I've seen, it's a
22 rather limited offer, but I do have a couple of issues with it.
23 One, I would like the faces of the victims to be masked. You
24 can show the wounds without showing the faces. I think that
25 will reduce emotional impact to some degree.

1 There is one of Krystle Campbell that is a close-up of
2 a wound that is particularly gory. I didn't know why the
3 close-up showed more than the, more or less, full body.

4 MS. PELLEGRINI: If I remember that one, your Honor --
5 and there are a couple -- I think it was because that one
6 actually shows what is being removed is a piece of shrapnel,
7 which there is also a picture of.

8 THE COURT: I'll look at it with that in mind.

9 There's one of Martin Richard clothed, I guess,
03:06 10 post-event, pre-autopsy.

11 MS. PELLEGRINI: Pre-autopsy.

12 THE COURT: Just different. There wasn't anything for
13 the others. I just didn't --

14 MS. PELLEGRINI: At the time that we were considering
15 those photos, it wasn't quite clear to me that we had to put in
16 everything that we were going to use for simply liability but
17 possibly penalty as well. But I don't think, after review of
18 that, that that one needs to go in at this time.

19 THE COURT: Okay. So you'll mask the faces of the
03:06 20 victims?

21 MS. PELLEGRINI: We're going to have to find a way to
22 do it.

23 MS. CONRAD: May I just inquire --

24 THE COURT: I think you can just put something over
25 and recopy it.

1 MS. PELLEGRINI: That's what we'll do.

2 MS. CONRAD: I can't recall -- there was some back and
3 forth about, you know, not displaying these publicly or
4 releasing them publicly.

5 THE COURT: We'll do the same thing. We did it with
6 Collier.

7 MS. CONRAD: I'm concerned because apparently the
8 Collier autopsy photos were displayed to the press after the
9 fact. I thought the Court's ruling had been that they would
03:07 10 not -- that the autopsy photos would not be disclosed except to
11 the jury and not to spectators or the public.

12 It's my understanding they weren't provided copies,
13 but I think actually displaying the photos to the press seemed
14 inconsistent with what I understood the Court's ruling to be.
15 And I wanted to make sure that we were all on the same page
16 with respect to the civilian, as it were, victims.

17 MR. WEINREB: I didn't actually think there was a
18 ruling from the Court other than a ruling permitting us not to
19 display them, in the courtroom, to the audience, as it were,
03:08 20 because we had family members and friends of the victims in the
21 audience, and we didn't want them to have to leave. But the
22 autopsy photos themselves are being entered -- offered into
23 evidence and shown to the jury.

24 And our arrangement with the press -- part of the
25 reason why they have -- they're content now and willing to

1 withdraw their motion is we've taken the position with them
2 that they are entitled to report on all of the evidence but not
3 necessarily have copies of it or the ability to photograph it
4 or reproduce it and post it on the internet or on the front
5 pages of newspapers.

6 For them to be able to report it, they have to be able
7 to see it and describe what's in it in words without actually
8 having -- getting the image.

9 THE COURT: They don't get the image?

03:08 10 MR. WEINREB: They don't get the image. We show them
11 the image, but they're not allowed to take pictures of it.
12 They're not allowed to videotape it.

13 MS. CONRAD: This idea -- I'm sorry.

14 THE COURT: I hadn't addressed this specific issue,
15 focused on it.

16 MS. CONRAD: It seems to me this idea of an
17 extrajudicial display --

18 THE COURT: It's not --

19 MS. CONRAD: -- of evidence -- it is.

03:09 20 THE COURT: You mean a private display to the press?

21 MS. CONRAD: To the press, yes.

22 MS. PELLEGRINI: But it's an item that is in evidence.

23 MS. CONRAD: The exhibits belong to the court once
24 they're admitted. I think for the government then, having
25 represented that it will not be showing them to the general

1 public or to the media in the courtroom, to arrange a private
2 viewing for the press --

3 THE COURT: Well, I haven't thought about it. Let me
4 think about it. I'm inclined to say it's okay as long as they
5 don't get copies and can't reproduce it. If they can see it
6 and write about it so they can describe the image, I think
7 that's probably okay, but I'll reflect on --

8 MS. CONRAD: I think the potential for prejudice there
9 is pretty high.

03:09 10 THE COURT: No. Okay. I'll consider it.

11 MR. WEINREB: I'd just like to add, I see no potential
12 for prejudice. The jury is being shown the images, so we have
13 no worries about the jury.

14 THE COURT: Right.

15 MR. WEINREB: And as for the victims, I'm not sure who
16 exactly is being prejudiced here, whose rights the defense is
17 seeking to protect here, but the victims are aware of this
18 arrangement and are okay with it.

19 MS. CONRAD: We are concerned about the victims.
03:10 20 We're also concerned about the general public, which includes
21 members of the jurors' families who might read about it and
22 comment to them, you know, Gee, I read that these pictures are
23 pretty horrible. What was that like? We don't know, and it
24 seems to be taking a risk that we don't need to take.

25 THE COURT: The jurors have seen so much more evidence

1 about this case now at this point than any member of the
2 public. I doubt very much that their views are going to be
3 influenced by something somebody will say outside compared to
4 what they've seen here. Anyway, I will think about it
5 overnight and let you know briefly in the morning because I
6 haven't previously considered it. I think that's my list.

7 MR. MELLIN: Your Honor, I think it's unlikely we wrap
8 up Thursday then. I'm not sure. It's going to be a defense
9 case.

03:11 10 MR. CLARKE: We've been in conversation about that,
11 and we've talked about names of people we intend to call.
12 Hopefully, we'll have a good list. Does the Court want the
13 list, too?

14 THE COURT: I do. And I'd like to know, just for
15 planning purposes, if there's a defense case, how many days
16 because we're getting to the point where we have to look
17 forward for a possible second case, second phase, and I just
18 want to figure out the timing of that as we go forward. My
19 thought is we'll have to take some kind of a break. I don't
03:11 20 want it to be very long. It could be a natural break. If the
21 case is scheduled to finish on Thursday, we could pick up
22 perhaps as soon as Monday, maybe Tuesday. I don't want to
23 leave a jury half through its work out dangling someplace. So
24 I want to -- I want it to be realistic but as short as
25 possible.

1 MS. CLARKE: Sure. We had estimated, I think, to the
2 Court in a lobby conference before a couple of days depending
3 on cross-examination. And the primary -- most of our
4 substantive evidence will come from experts. I've talked to
5 Mr. Weinreb about them. We do have some records and
6 foundational issues. I don't think there are authentication
7 issues. We just have to figure out whether there's a witness
8 to put them into evidence.

9 THE COURT: Right. So rough estimate, nobody being
03:12 10 held to it?

11 MS. CLARKE: Two, maximum three, days.

12 THE COURT: Okay. That's what I was getting at. If
13 the government were to wrap up on Thursday, Tuesday or
14 Wednesday?

15 MS. CLARKE: Sure.

16 MR. MELLIN: Would the Court want to close the
17 following day or give --

18 THE COURT: I don't know. That's what I want to think
19 about. Tuesday, maybe yes; Wednesday, maybe not. It's likely
03:12 20 to be a busy weekend for people. It is both -- as I understand
21 it, both Christian holidays and the Jewish holidays. So, you
22 know, jurors and others will have things to do. That's one of
23 the factors I'm trying to play with in my head.

24 MR. WEINREB: I will say, your Honor, although Miss
25 Clarke has previewed for me a couple of the witnesses who the

1 defense might call in their case in chief, the time has come
2 where we could really use a list of witnesses and exhibits
3 coming in through those witnesses as we gave them and have been
4 continuing to give them.

5 MS. CLARKE: Sure. I mean --

6 THE COURT: Even if it's tentative. It's been
7 tentative on this side. Even if it's tentative.

8 MS. CLARKE: Sure.

9 MR. WEINREB: At least with respect to our first
03:13 10 couple witnesses, or first 20 witnesses, frankly, they had it
11 weeks and weeks in advance. And we're just asking for a few
12 days.

13 MR. CHAKRAVARTY: Especially since, if there are going
14 to be expert witnesses, we may want an expert present, and
15 those people are not local.

16 MS. CLARKE: Yes. I've talked to Bill about their
17 names.

18 THE COURT: Finally, the other end-of-case thing is,
19 of course, instructions, jury slip, and so on.

03:13 20 MR. WEINREB: That's at the top of my list.

21 THE COURT: Like everything else.

22 MS. CLARKE: Does the Court have a standard set of
23 instructions that it gives, I mean, outside of the elements on
24 these offenses?

25 THE COURT: More or less, I say the same thing. I

1 don't know if you'd call it a standard set. I don't -- I try,
2 and almost always, avoid reading to the jury. I talk to them.
3 So it follows an outline, but it doesn't always come out the
4 same way. Even when I write it out, it doesn't come out the
5 same way because I deviate liberally from it when I talk to
6 them. I cover the usual topics.

7 MS. CLARKE: Rule 30 would give the parties an
8 opportunity to see the Court's instructions and to object to
9 them. So, typically, my experience is not that courts ad-lib
03:14 10 their instructions but that they provide them with --

11 THE COURT: This case may be an exception. Certainly,
12 because of the elements, I think they will be quite literal.
13 Just on that, I was thinking -- I don't know whether anybody
14 would object. And I don't know whether I'm going to do it or
15 not or whether it's feasible or worth it -- to have sort of a
16 PowerPoint presentation as I'm going through the elements. I'm
17 just thinking of visualizing, you know, Element No. 1 comes up
18 on the screen and Element No. 2 comes up on the screen. I just
19 think people learn visually as well as orally, and it may help
03:15 20 on what are relatively complex charges.

21 MR. WEINREB: The government has no objection.

22 MR. CHAKRAVARTY: We would have no problem. We would
23 like to see that before.

24 THE COURT: Of course. Okay.

25 MR. WATKINS: One quick matter. Can I follow up the

1 sidebar in regard to Dowd to make one last pitch, for what it's
2 worth? After that sidebar, the government put on that further
3 evidence about a bullet hole in 40 Laurel Street, which is now
4 the other side of Dexter Avenue. So I think that changes
5 things a little bit about what the jury might and might not be
6 able to -- given the problem of a stray bullet there, given
7 there's no testimony about who fired that bullet into 40
8 Dexter. But it certainly could be the case now, the jury could
9 start to think, Wow, if the bullet made it that far, it could
03:16 10 have made it down to Officer Donohue. So for those reasons,
11 once again, I'd make the pitch to re-call Trooper Dowd to talk
12 about that issue.

13 THE COURT: I don't think so, but I will say I had --
14 the same thought went through my head when I was listening to
15 that. I think the more the government skirts it, the more
16 dangerous it becomes. As I said, I think at the sidebar, I
17 think it's irrelevant to both sides but --

18 MR. WATKINS: They think it's relevant.

19 MR. WEINREB: We've moved on from Watertown so that's
03:16 20 it.

21 MS. CLARKE: But they moved on from Watertown after
22 repeatedly suggesting this bullet from one of the Tsarnaevs hit
23 Donohue. The testimony about the bullet in the house, nobody
24 could even identify what the bullet was. So the government
25 puts it in to suggest that it's a Tsarnaev-related bullet. It

1 just seems unfair.

2 MR. WEINREB: It is a Ruger bullet. That's why the
3 government put it in.

4 MS. CLARKE: Well, there's no testimony to that, no
5 evidence to that.

6 MR. WEINREB: But that, in fact, is the fact so
7 there's no prejudice. I'm proffering that that's the case.

8 THE COURT: It is the same place.

9 MS. CONRAD: What about striking the 40 Dexter
03:17 10 testimony then?

11 THE COURT: No.

12 MR. MELLIN: Your Honor, I'm assuming we're not
13 sitting on Patriots' Day?

14 THE COURT: Right. That is one of the -- at the
15 beginning of the case, we said "except when there's a Monday
16 holiday." This is a state holiday, not a federal holiday. But
17 I thought about it partly as a distraction for the jurors from
18 what else is going on, but then I thought that the logistics
19 may be difficult, their getting into Boston in the usual way
03:17 20 and so on and so forth. I just didn't want to get tangled up
21 in traffic problems and things like that. Massachusetts
22 residents are used to having that day off and having the rest
23 of the week. So that week would be a Tuesday-through-Friday
24 week. Okay. Thanks.

25 (Whereupon, at 4:18 p.m. the lobby conference concluded.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Cheryl Dahlstrom

October 7, 2015

Cheryl Dahlstrom, RMR, CRR

Dated

Official Court Reporter